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Omar Rodriguez, et al. v. Burbank Police Department, et al.
BC 414602
June 18, 2010

Motion of Plaintiff Jamal Childs for New Trial

The motion is denied.

Although, as defendant notes, plaintiff's memorandum and the supporting affidavits in support of his motion for new trial were filed and served two days late, on May 17, 2010, the court does not exercise its discretion to deny the motion on that basis. CRC 3.1600.

In his Notice of Intention to Move for New Trial plaintiff set forth the statutory grounds for the motion, specifying CCP §§ 657(3), (6) and (7). In his supporting memorandum, plaintiff identifies subdivision (1) as another ground upon which he seeks a new trial. A motion for new trial can only be granted on a ground specified in the notice of intention to move for new trial. 8 Witkin, Cal. Procedure (4th ed. 1997), Attack §20. Accordingly, the motion based on subdivision (1) must be denied.

The new trial motion does not address plaintiff's retaliation or POBRA claims. Accordingly, there is no basis for a new trial as to those claims.

The grounds for the motion set forth in the Notice of Intent to Move for New Trial are: (a) Sufficient evidence and argument were presented to support (i) treatment of the motion for summary judgment as a motion for judgment on the pleadings and (ii) the opportunity to amend the First Amended Complaint to assert the discrimination claim under the theory of disparate impact. CCP §657(6), 657(7); (b) The court's grant of summary judgment as to the harassment claim was based on an erroneous interpretation of *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511. CCP §657(6), 657(7); and (c) Certain foundational facts were inadvertently omitted from material deposition evidence submitted to the court, and therefore excluded from consideration. Had such evidence been considered, the Motion for Summary Judgment should have been properly denied, as supported by the declaration of counsel. CCP §657(3).

Harassment. The court has reconsidered the authorities and the evidence, *Valdez v. J. D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494 and finds no reason to order a new trial. The court does not believe it misinterpreted the holding of *Beyda.* As explained in the court's March 18, 2010 ruling, the evidence presented by plaintiff in opposition to defendant's motion for summary judgment, whether admissible or not, is not sufficient as a matter of law to establish harassment.

Discrimination. Plaintiff Childs does not assert that there are grounds for a new trial on his disparate treatment discrimination claim. Instead, plaintiff asserts that the court should have treated defendant's motion for summary judgment as a motion for judgment on the pleadings and allowed plaintiff to amend the First Amended Complaint to assert a disparate impact discrimination claim. Plaintiff's arguments have no merit.

Plaintiff's assertion that the court should have treated the motion for summary judgment as a motion for judgment on the pleadings is meritless. Such a procedure is appropriate only where the motion itself is defective (i.e., failure to file separate statement, etc.). Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2009) ¶10:329.

Disparate impact. As the court explained in its ruling of March 18, 2010, a summary judgment motion may not be granted or denied on issues not raised by the pleadings. *Government Employees Ins. Co. v. Sup.Ct. (Sims)* (2000) 79 Cal. App. 4th 95, 98. While a party may seek leave to amend its pleadings even while a motion for summary judgment is pending, *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965, plaintiff Childs never requested leave to amend his complaint to assert a cause of action for disparate impact discrimination.

Plaintiff's claim that a disparate impact claim was already pled in the First Amended Complaint (March 18, 2010 Hearing Transcript, 13:8-14:5) is likewise unavailing. To plead a cause of action for disparate impact employment discrimination, a plaintiff must show the existence of the employer's practice or policy, that the policy has significant adverse effects on persons of a protected class, that the impact of the policy is on terms, conditions or privileges of employment of the protected class, and that the employee population in general is not affected by the policy to the same degree. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1486. Plaintiff's "disparate impact" theory is that neutral city policies had a disparate impact on African-American candidates and officers causing (1) not enough African-American officers to be hired, and (2) African-American officers not to be promoted. These vague allegations do not satisfy the pleading requirements for a cause of action for disparate impact discrimination. Even if they did, however, plaintiff Childs has no standing to allege either of these theories because (1) he cannot claim he suffered from hiring discrimination since he alleges and admits he was hired, and (2) he cannot claim he suffered from promotion discrimination since he admitted under oath that he never applied for a promotion. (UF 1, 4.) Having suffered no harm from these claimed wrongdoings, he has no standing to assert them or to rely on them to defeat summary judgment. Accordingly, even if plaintiff (1) had asserted a disparate impact claim or (2) did not assert such a claim but were given leave to amend to so allege, his claim would fail because he presents no evidence to show that he has standing to pursue such a claim based on the facts alleged in the First Amended Complaint.

Plaintiff's claim that no Black BPD officer has ever received a promotion of any kind in the history of the BPD is evidence of a "gross statistical disparity" which alone constitutes "prima facie proof of a pattern or practice of discrimination" is likewise unavailing. Plaintiff presents no evidence that any Black BPD officer ever sought or applied for a promotion. Without a showing that some Black officers applied and tested for and were denied promotions, the fact that there are no Black officers above the level of police officer does not constitute proof that any facially neutral practice by the employer has a disparate impact on a protected group.

Evidentiary issues. Plaintiff's argument that he is entitled to a new trial because his failure to provide foundation for the evidence he presented was based on technical problems with legal software is also meritless. The declaration of counsel filed in support of the motion asserts the pagination of a legal support program, "Live Note", was inconsistent with the hard copy of the

testimony that was cited in Plaintiffs opposition Separate Statement, and that this constituted "surprise." "'Surprise' as a ground for a new trial denotes some condition or a situation in which a party to an action is unexpectedly placed to his detriment. The condition or situation must have been such that ordinary prudence on the part of the person claiming surprise could not have guarded against and prevented it. Such party must not have been negligent in the circumstances. *Wade v. DeBernardi* (1970) 4 Cal.App.3d 967, 971. A mistake, or inadvertence is not sufficient to show an "accident or surprise." *Marriage of Liu* (1987) 197 Cal.App.3d 143, 1.55. In this case, ordinary prudence, including review of the evidence presented in opposition to the motion before filing and serving it, as well as cite-checking, would have brought any citation errors to counsel's attention, enabling him to correct them. Accordingly, the purported errors do not constitute "surprise" justifying a new trial. In any event, plaintiff fails to show that allowing him to resubmit the evidence with the proper foundation would result in a different outcome, where defendant's objections were not solely based on lack of foundation. Plaintiff fails to identify any specific objections that were sustained due to the software errors.